

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

DAVID FEIGE, On Behalf of Himself and All Other  
Persons Similarly Situated,

*Plaintiff,*

-against-

RCN CORPORATION,

*Defendant.*

Case No. 07 cv 8539 (AKH)

**AFFIDAVIT OF JOSEPH A. PATELLA IN OPPOSITION TO  
PLAINTIFF'S MOTION FOR RECONSIDERATION**

STATE OF NEW YORK     )  
                                      ) ss.:  
COUNTY OF NEW YORK    )

Joseph A. Patella, being duly sworn deposes and says:

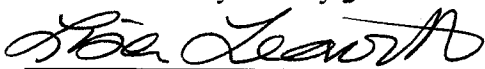
1. I am an attorney with the law firm of Andrews Kurth LLP, attorneys for Defendant RCN Corporation ("RCN") in this action. I submit this affidavit in support of RCN's Memorandum of Law in Opposition to Plaintiff's Motion for Reconsideration.

2. Attached hereto as Exhibit A is a copy of RCN's Terms and Conditions.

3. As more fully set forth in the accompanying Memorandum of Law, Plaintiff should not be entitled to reconsideration of the Court's dismissal of his claim under Section 349 of the New York General Business Law.

  
Joseph A. Patella

Subscribed and sworn to before  
me this 19<sup>th</sup> day of May 2008



Notary Public

LISA LEAVITT  
Notary Public, State of New York  
No. 01LE6153458  
Qualified in New York County  
Commission Expires Oct. 2, 2010



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Policies/Disclaimers

Contact Help

Have a question? If you can't find the answer in our help pages, contact us via email.

## Policies and Disclaimers

### RCN Customer Terms and Conditions

1. **General:** Customer understands that services provided hereunder may be governed by certain federal, state and local regulatory authorities and by certain terms and conditions of service contained in any applicable RCN tariff on file with such authorities. In the event of any conflict between the terms and conditions set forth herein and those provided under any government regulations or RCN tariff, in all instances, the terms and conditions set forth in the regulations or RCN tariff(s) shall prevail.
2. **Credit Check:** Where permitted by law, RCN reserves the right to verify credit as a condition of providing its services.
3. **Payment of Charges:** RCN will bill Customer for services monthly, in advance. If services begin on other than the first (1st) day of the month or terminate on other than the last day of the month, the charge for that month shall be determined by pro-rating the monthly payment by the number of days during which services were provided. RCN will bill Customer monthly, in arrears, for Pay-Per-View or other services ordered where charges are based on actual usage or on orders placed during the previous month. Customer must pay all undisputed monthly charges as itemized on the RCN monthly invoice by the due date specified on the invoice (or as otherwise required by law, if later). If Customer, in good faith, disputes all or any portion of such charges, Customer must timely pay the undisputed portion of the amount due and notify RCN of disputed amounts, and reasons therefor, within thirty (30) days of the invoice date (or such other amount of time as may be prescribed by law). Failure to pay charges when due may result in discontinuance of service, the removal of all equipment and/or imposition of a late payment or service charge. Customer may also incur an additional charge for dishonored checks. In the event that RCN engages in collections activities, an additional collections charge may be imposed. RCN shall furnish to Customer upon request, a list of its current rates and charges.
4. **Special Construction:** If Customer requests a change in location of all or part of the services prior to the completion of construction or installation, Customer agrees to pay RCN all reasonable additional costs incurred by RCN to accommodate Customer's request.
5. **RCN Property:** RCN shall maintain exclusive ownership of all equipment delivered to and/or installed within or upon Customer's residence, including but not limited to, cables, wires, amplifiers, cable modems, converter boxes and remotes ("Equipment"). Customer (or any other person acting on behalf or under supervision of Customer) shall not open, tamper with, service, make any alterations to, or remove any Equipment from its point of initial installation. Any alteration, tampering, removal or the use of Equipment which causes the receipt of services without authorization is unlawful, prohibited, and may subject Customer to criminal and/or civil penalties. Customer must return all Equipment to RCN immediately upon termination of services. Failure to do so will result in an additional charge in accordance with RCN's then current schedule of charges, which amount shall be due immediately. Customer shall pay such charges regardless of circumstances, in the event that the Equipment is lost (through theft or otherwise), damaged, modified, or destroyed. RCN may utilize any collateral form of payment Customer has provided to recover any and all equipment charges.
6. **Disruption or Failure of Services:** In no event shall RCN be liable for any failure or interruption of transmissions or services, including, without limitation, loss of data. Subject to applicable law, credit will be given for qualifying outages. RCN shall not be liable for any direct, indirect, consequential, incidental, special, exemplary or punitive damages from whatever cause. The service outage credit and Customer's termination rights shall be Customer's sole and exclusive remedies in the event of any disruption or failure of services. RCN MAKES NO REPRESENTATIONS AND WARRANTIES WITH RESPECT TO THE SERVICES, EITHER EXPRESS, IMPLIED, OR STATUTORY, AND RCN HEREBY EXPRESSLY DISCLAIMS ANY AND ALL WARRANTIES, INCLUDING, WITHOUT LIMITATION, IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

7. **Installation and Repair of RCN Equipment:** RCN will repair and/or replace defective Equipment at Customer's residence of record. RCN is not responsible for the maintenance or repair of any equipment not provided by RCN. A service charge may be imposed if damage to RCN Equipment is due to negligent use, misuse, or abuse, or if RCN determines that no such repair and/or replacement is necessary. RCN makes no warranties with respect to Equipment or service repairs provided or rendered by RCN, and disclaims any and all implied warranties, including warranties of merchantability or fitness for a particular purpose or use. In order to ensure compliance with applicable laws and performance standards, Customer agrees that the Equipment shall not be serviced by anyone other than RCN or its authorized contractors. Customer shall not connect, directly or indirectly, any additional television set(s) or any other electrical, mechanical or other devices to the Equipment without the prior written consent of RCN. Should any interconnected device or facility purchased by Customer fail to comply with the technical specifications established by the Federal Communications Commission, including but not limited to those relating to signal leakage, RCN reserves the right to terminate the applicable services.
8. **Force Majeure:** Neither party shall be liable for any delay or failure of performance or Equipment due to causes beyond its control, including, but not limited to: acts of God, fire, flood, explosion or other catastrophes; any law, order, regulation, action or request of a Federal, state or local governmental authority or of any civil or military authority; national emergencies; unavailability of rights-of-way or materials; inability to appropriately configure and/or interconnect the Equipment within Customer's residence; or strikes, lock-outs, work stoppages or other labor difficulties.
9. **Customer Property:** RCN assumes no responsibility for the condition or repair of any equipment not provided by RCN. Customer is responsible for the repair and maintenance of the same. RCN is not responsible or liable for any loss or impairment of reception of RCN's service due in whole or in part to a malfunction or defect in equipment not provided by RCN.
10. **Taxes and Other Charges:** Customer shall pay all applicable federal, state and local taxes, including but not limited to, all sales and excise taxes, imposed or levied on or with respect to service, equipment, installation or placement charges incurred with respect to the same. Customer shall also pay any additional "pass through" or surcharges that RCN is authorized to impose upon Customer's use of the services.
11. **Reproduction or Programs:** Customers agrees that the programming provided by RCN will be utilized solely for Customer's personal, non-commercial use and shall not be duplicated except as may be permitted by applicable law.
12. **Access to Customer Premises:** Customer warrants that Customer is the owner of, a tenant in, or otherwise has express authority to occupy the service address indicated on the face side hereof. Customer shall indemnify, defend, and hold RCN harmless from any and all claims resulting from a breach of this warranty. Customer shall provide RCN with access to the premises at all reasonable times to inspect, maintain, upgrade, and/or repair the Equipment and, upon the termination of services, to remove the same from the premises. RCN's failure to remove the Equipment shall not be deemed an abandonment thereof, except as provided by law, and shall not relieve Customer of its obligation to return the Equipment upon termination of services.
13. **Assignment or Transfer:** This Agreement and the Equipment are not assignable or otherwise transferable by Customer. Customer shall notify RCN of any change of occupancy or ownership of the premises immediately upon such transfer of ownership or tenancy, and shall promptly return the Equipment to RCN upon such occurrence.
14. **Termination of Service:** Customer may terminate any or all services at any time by notifying RCN of its desire to do so. This Agreement and the services provided hereunder may be terminated (a) by RCN at any time without prior notice (i) if the Customer fails to comply in full with all the terms herein; (ii) Customer makes any express or implied threat of violence, or uses derogatory language, towards any employee, representative, agent, or contractor of RCN; or (iii) if RCN loses the right or ability to use public rights-of-way necessary to serve Customer, or (b) by Customer, at any time, upon notice to RCN, provided all Equipment is returned immediately to RCN. Upon termination of services, all Equipment must be returned immediately and outlets disconnected to avoid additional or continuing charges. In the event of termination by RCN, any restoration of service shall be solely at RCN's discretion and on such terms as RCN shall determine are necessary to resume service on a commercially reasonable basis.
15. **Breach of Agreement:** If Customer breaches this Agreement or fails to abide by RCN's



rates, rules and regulations, RCN, at its option, may discontinue the services and remove the Equipment. Customer shall pay all costs, including reasonable attorneys' fees to RCN in the event that RCN shall find it necessary to enforce collections or to otherwise preserve and protect its rights under this Agreement.

16. **Programming and Rates:** All programming, programming services, programming packages, number of channels, channel allocations and selection of broadcast channels are subject to change by RCN in its sole discretion, in accordance with applicable law. Customer acknowledges and agrees that RCN has the right at any time to preempt, without prior notice, specific programs or services advertised as available to Customer and to determine what substitute programming, if any, shall be made available. RCN may, at its discretion, make additions, deletions or modifications to its current program line-up without accountability or liability to Customer. RCN shall not be liable for failure to deliver any programming. Rates for the installation and provision of services or Equipment and rates for programming or other services are subject to change by RCN in its sole discretion, in accordance with applicable law.
17. **Programming Disclaimer:** RCN assumes no liability for any programming or information distributed over the cable system or Internet unless produced exclusively by RCN. RCN shall not be responsible for any products, merchandise or prizes promoted on or purchased through the use of the cable system, unless such products, merchandise or prizes are provided exclusively by RCN.
18. **Incorporation of Other Agreements, Policies, and Tariffs:** Customer agrees to adhere to the terms and conditions of any applicable RCN tariff, the RCN Internet Access Agreement, the RCN Internet Customer Guide, the RCN Acceptable Use Policy and the RCN High Speed Cable Modem Service Addendum, as the same may be amended from time to time. Certain of these documents can be found on the RCN home page (<http://www.rcn.com>) and/or the RCN setup disk. By signing this Work Order Form, and by Customer's use of the services, Customer is deemed to have read and agreed to be bound by these documents. Customer's breach of any of the foregoing agreements, policies, or tariffs shall be automatically deemed to be a breach of this Agreement.
19. **Internet Local Access Number:** RCN will not be responsible for any telephone charges incurred while using the Internet. Customers are responsible for verifying that their access number is a local telephone call.
20. **VoIP 911 Dialing:** Under certain circumstances, RCN's Voice-Over-Internet-Protocol ("VoIP") service (where available) will not support Traditional 911 or Enhanced 911 (E911) dialing access to emergency services. The address associated with an E911 call on RCN's VoIP service is specific to Customer's original service location only. Movement of the VoIP equipment from the original service location to a new service location may result in a mistaken identification of the E911 call as having come from the original service location. Furthermore, 911 dialing on RCN's VoIP service will not function in the event of a power failure or improper network connection and/or function. Customer understands and acknowledges that RCN, its affiliates, subsidiaries, parent companies and network service providers, will have no liability whatsoever with respect to 911 dialing on RCN's VoIP service.
21. **Entire Agreement:** This Work Order, together with the terms and conditions contained herein, constitute the entire agreement between the Customer and RCN. Customer represents and warrants that he/she has the right to enter into this Agreement. No undertaking, representation or warranty made by any agent or representative of RCN in connection with the sale, installation, maintenance or removal of RCN's services shall be binding on RCN except as expressly included herein. RCN may amend this Agreement upon prior notice to Customer. Customer's election to continue receiving the Service thereafter shall be deemed to constitute Customer's acknowledgment and acceptance of such amendment.
22. **Customer Privacy Notice:** At RCN, the privacy and security of your account is very important to us. That is why we have taken measures to protect the privacy of your personally identifiable account records and to comply with the federal laws and FCC regulations that govern use and disclosure of customer information.
  - a. Account passwords: To better protect all of your account information and allow us to provide you the best quality customer service, you must establish a password and two backup security questions, for your account when you establish service.
  - b. Cable television customer privacy: As a subscriber to cable television service, you are entitled under Section 631 of the Communications Act of 1934

("Communications Act"), as amended, to know the limitations imposed upon cable operators in the collection and disclosure of personally identifiable subscriber information, the types of personally identifiable information collected, how subscriber information is used, under what conditions it is disclosed, the period during which it is maintained, and the right of subscribers concerning such information and its disclosure. This information is provided in the RCN Privacy Policy, a copy of which has been provided to you and receipt of which you are acknowledging by signing this agreement.

- c. Telephone customer privacy: As set forth more fully in the RCN Privacy Policy, the Communications Act gives you a right to confidentiality of information about the telephone services you purchase from RCN, including how many telecommunications services you have, the types of lines you buy, technical characteristics, class of service (business or residential), as well as where, when, and to whom you place a call, and the related billing for these services. However, unless you have an unlisted or unpublished number, we may release your name, address, and telephone number for listing in directories or for directory assistance services, including to unaffiliated third parties. RCN may use information about your telephone services without notifying you, to provide and repair the services you have ordered, for billing and collection, and for protection of our network and our subscribers against fraud, abuse, and unlawful use. You have the right pursuant to the Communications Act to restrict the use of your customer information for marketing purposes, as the RCN Privacy Policy explains.
- d. Internet privacy policies: RCN respects its subscribers' online privacy, and will not randomly monitor or disclose the contents of private e-mail or private chat room communications. However, as set forth fully in the RCN Internet Access Agreement, Customer agrees that RCN has the right, but not the obligation, to monitor or disclose the contents of private communication over the Internet, if RCN, in its sole discretion, reasonably believes that such action is necessary: (i) to comply with applicable law or valid legal process; (ii) to protect RCN rights or property; or (iii) in emergencies when a person's physical safety is at issue. In addition, RCN reserves the right to disclose the identity of a subscriber to third parties in response to a valid legal subpoena and to otherwise cooperate with legitimate law enforcement inquiries and lawful civil proceedings.